IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1109 of 1997
with
SPECIAL CIVIL APPLICATION NO 1315 OF 1998

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VISHWABANDHU D SHAH

Versus

SWAMI ATMANAND SARASWATI AYURVED CO-OP PHARMACY LTD.

Appearance:
MR DIPAK R DAVE for WORKMAN.
MR GM JOSHI for EMPLOYER.

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 17/09/2004

ORAL JUDGEMENT

Heard learned advocate Mr.Dave for the workman

and Mr.Joshi for the employer. Common award made by the labour Court, Surat in Reference No. 364 of 1981 dated 27th May, 1996 is under challenge in these two petitions. As per the said award, the reference made at the instance of the workman was partly allowed and the employer was directed to reinstate the workman on his original post or equivalent to it a fresh on probation period for a period of two years subject to production of two good sureties that the workman will not commit any subsequent misconduct and would not remain absent without permission.It was also observed that after satisfactory completion of the probation period of two years, the establishment will have to make the workman permanent. By filing Special Civil ApplicationNo. 1109 of 1997, the workman is claiming back wages for the intervening period with all other consequential benefits whereas the petitioner in Special Civil Application No. 1315 of 1998 is praying for setting aside the award made by the labour court and for dismissal of the reference which was made at the instance of the workman.

During the course of hearing, it was submitted by the learned advocate Mr. Dave for the workman that the labour court has not properly exercised the discretion vested in it under section 11A of the ID Act. He submits that once inquiry is held tobe legal and valid, then, it is necessary for the labour court to examine whether the findings are baseless and/or perverse or not but without examining that aspect the labour court has straightway recorded conclusion that the charge levelled against the workman is proved and that is the error committed by the labour court . He submitted that as regards the charge of misbehaving with the manager, cross complaints were filed and ultimately, same were settled between the parties. He also submitted that it ought to have been appreciated by the labour court that it is a clear case of victimization because after reinstatement as per the award of the labour court, again, services of the workman were terminated by the employer and, therefore, according to him, the labour court has committed error in not granting back wages for the intervening period. No other submissions were made by the learned advocate Mr. Dave.

On the other hand, learned advocate Mr.Joshi appearing for the employer has submitted that since the labour court has come to the conclusion that the charge levelled against the workman is proved, the labour court ought not to have granted reinstatement in favour of the workman in exercise of the powers under sec. 11A of the ID Act, 1947. He also submitted that no reasons have been recorded by the labour court in support of its

conclusion and, therefore, award of reinstatement is required to be quashed and set aside. Except this, no other submissions were made by the learned advocate Mr.Joshi.

I have considered the submissions made by the learned advocates for the parties. I have also perused the award in question made by the labour court. Before the labour court, statement of claim was filed by the workman at Exh.4 according to which, the workman was a permanent employee of the employer and that on 19.7.80 as well as on 2.8.1980, without any valid reason, charge sheet was served upon the workman which was replied by him and after ex parte inquiry, he was dismissed from service on 1.11.1980. Reply as filed by the employer at Exh. 7 before the labour court wherein certain legal questions about the jurisdiction of the labour court were raised and according to the employer, the workman had committed misconduct and, therefore, show cause notice was issued and after completion of the departmental inquiry, he was rightly dismissed from service on 1st November, 1980.

Before the labour court, preliminary point about the legality, validity and propriety of the departmental inquiry was raised by the workman vide Exh. 64 wherein it was held by the labour court that the departmental inquiry held against the workman was legal and valid. Workman was examined before the labour court and it was deposed by him that the was victimized by the employer and he was not gainfully employed elsewhere during the intervening period. Thereafter, on behalf of the employer, one witness I.J.Desai was examined who was the Branch Manager at the relevant time in the establishment He deposed that the workman was journalist and doing the advertisement work in Pratap Press and, thereafter, he had worked in Gujarat Samachar, Lok Satta as a reporter or journalist. This witness was not cross examined on behalf of the workman. Therefore, oral evidence given by the said witness Shri Desai on behalf of the employer has remained unchallenged and uncontroverted by the workman. Thereafter, the labour court examined the merits. Workman was examined at Exh. 11.

The labour court examined the question as to whether the punishment imposed against the workman by the employer is proportionate or not, looking to the gravity of misconduct. The labour court has also considered the sickness of the workman and the compromise arrived at between the parties in respect of the criminal case. Considering the evidence at Exh. 21, the labour court has

not granted back wages to the workman for the intervening period. Considering the validity of the departmental inquiry, the labour court has come to the conclusion that the misconduct is proved against the workman. Thereafter, the labour court examined the matter under section 11A of the ID Act, 1947 and thereafter, it made the award of reinstatement on probation for two years with two sureties.

As regards the contention raised by the learned advocate Mr. Dave that the labour court has not examined the question of finding before exercising powers under section 11A of the ID Act, 1947, he has not been able to point out whether such question was raised by the workman before the labour court or not. No such submission was made by the workman before the labour court and findings were not challenged before the labour court and, therefore, according to my opinion, the labour court was right in not examining that aspect of the matter. It is the duty of the labour court to examine the question which is raised in the statement of claim and pressed into service and if such contention has not been raised and/or pressed into service by the parties, then, the labour court is not bound to examine such question. Here, it has not been pointed out by Mr. Dave that such contention, though raised, was not examined by the labour court. Therefore, the labour court considered the fact that looking to the misconduct enumerated in the notice dated 19th July, 1980, the workman was habitually remaining absent from service from December, 1979 to June, 1980 and over and above that, enjoyed EL for 21 days for the same period, misbehaved with the manager and used filthy language and since such charge was proved and considering that it was not a case of remaining absent for a few days but serious case against the workman. Inspite of such facts, the labour court granted benefit in reformative measure with hope that in future, the workman will not remain absent and will not commit the misconduct and therefore, the order in question was made by the labour court in exercise of the powers under section 11A of the ID Act, 1947. For that, the labour court is having jurisdiction under sec. 11A of the ID Act, 1947 when it is satisfied that the punishment in question is disproportionate and unjust. Looking to the record, the labour court found that it was harsh and unjust and, therefore, the labour court exercised its discretionary powers.

Employer has filed reply. It is necessary to note that after the award dated 27th May, 1996 granting reinstatement in favour of the workman, more than 20

notices were served upon the workman to resume duties as per the award of the labour court but the workman had not reported for work and he remained absent without work inspite of repeated requests made by the employer to resume and join the work and, therefore, considering the entire facts and circumstances of this case, according to my opinion, the labour court has rightly made award in question in reformative measure for enabling the workman to get job but the subsequent event shows that the workman is not interested in job which has been proved by the employer by filing affidavit in reply that the workman has failed to resume duties inspite of 20 reminders.

Recently, in Delhi Transport Corporation versus Sardar Singh reported in AIR SCW 2004 page 4622, the apex court has considered the case of remaining absent by the employee without prior permission is a serious misconduct. It was considered by the apex court that the grant of leave without pay for such absence without prior permission is not sufficient to conclude that the leave was not unauthorized conduct of such an employee and it could hardly be justified and in such case of termination or removal of an employee was the proper punishment.

I have considered the matter from all angles. Award in question has been fully implemented by the employer by calling the workman for resuming by writing about 20 letters as stated in the affidavit filed by the employer not controverted by the workman. Therefore, in reality, the award in question has been implemented and the second termination order was passed by the employer and in view of that, the petition being special civil application no.1315 of 1998 has become infructuous by passage of time. Similarly, petition filed by the workman has also become infructuous in view of the subsequent development and considering the conduct of the workman of not reporting for duty inspite of repeated letters written by the employer in compliance of the award in question. Considering the evidence of the witness for the employer as regards gainful employment of the workman which was not cross examined by the workman, the labour court was right in not granting any back wages to the workman during the intervening period. Therefore, no error whatsoever was committed by the labour court in making the award in question. Therefore, no interference is required in exercise of the powers under Article 227 of the Constitution of India.

For the reasons recorded hereinabove, both the petitions are required to be dismissed. Same are

accordingly dismissed. Rule in both the petitions is discharged. Interim relief, if any shall stand vacated. There shall be no order as to costs.

(H.K. Rathod,J.)

Vyas